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COMSA FARMS BHD

v.

MALAYSIAN ASSURANCE ALLIANCE BHD (NO 2)

B

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D4-22-1200-2007]
17 MAY 2012

C ***CIVIL PROCEDURE:*** *Striking out - Application for - Want of prosecution - Allegation of - Failure of plaintiff to make reasonable attempts to prosecute action - Whether delay inordinate and inexcusable - Whether there was abuse of court process - Whether action ought to be dismissed*

D This was the defendant's application to strike out the plaintiff's action for want of prosecution. Briefly, the plaintiff had applied for an interlocutory injunction to restrain the defendant from dealing with lands charged to the defendant as security for loan to the plaintiff. The application was dismissed on 13 November 2008. E The plaintiff did not seek case management directions immediately to set down the matter for trial or obtained a stay of proceeding for any legitimate reasons. Subsequently, the plaintiff was wound up on 3 November 2009 and only obtained sanction on 16 January 2012. The defendant alleged that since the dismissal F of the plaintiff's application, there was inaction on the part of the plaintiff to set the matter down for trial. The defendant submitted that the delay was inordinate and inexcusable and that the defendant had been prejudiced by the delay. According to the G defendant, the plaintiff's action lacked seriousness and *bona fides*.

Held (allowing defendant's application in prayer 1):

(1) In an application for want of prosecution, the focus should only be on the issue of delay. Once the application was H dismissed in 2008, it would have been most appropriate for the plaintiff to proceed with case management and set the matter down for trial. Such a step would be within the spirit and intent of O. 34 of the Rules of the High Court 1980 which requires an action to be justly, expeditiously and I economically disposed of. In the event for any reason

whatsoever the plaintiff was not able to proceed with the matter, the plaintiff ought to have filed an application for stay of proceedings and it was at the discretion of the court to make appropriate orders as it deems fit. In the instant case, both steps were not taken by the plaintiff and no reason was given for not doing so. (para 7)

(2) The plaintiff had not demonstrated in their affidavits that they had made all reasonable attempts to prosecute this action. The delay also demonstrated that the plaintiff had no intention of bringing the action to a conclusion. The delay amounted to an abuse of court process and the action ought to be dismissed in exercise of court's inherent jurisdiction. (para 7)

Case(s) referred to:
Birket v. James [1977] 2 All ER 801 ***(refd)***
Genisys Integrated Engineers Pte Ltd v. Pati Sdn Bhd [2012] 1 LNS 232 HC ***(refd)***
Grovit and others v. Doctor and others [1997] 2 All ER 417 ***(refd)***
TM Feroze Khan & Ors v. Meera Hussain TM Mohamed Mydin [1999] 4 CLJ 373 FC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 34

For the plaintiff - Dato' Ambiga (Mohd Rizal with her); M/s Bahari & Bahari
For the defendant - R Vinayaga - M/s Skrine

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the defendant's application to strike out the plaintiff's action for want of prosecution.

[2] Numerous affidavits have been filed to justify each party's argument, and in that process, merits of the case were also canvassed. In an application for want of prosecution, the focus should only be on the issue of delay. The court should not be burdened with irrelevant issues and numerous affidavits, and in this case, nearly eight affidavits have been filed.

[3] I have requested the deputy registrar to prepare a chronology of summary of minutes of court and that chronology is marked as encl. 53.

[4] The cases parties have relied on are set out in the annexure to the judgment.

Brief Facts

[5] The writ was filed on 10 August 2007 and the plaintiff applied for an interlocutory injunction to restrain the defendant from dealing with lands charged to the defendant as security for loan to the plaintiff. That application for injunction was dismissed on 13 November 2008. The plaintiff did not seek case management directions immediately to set down the matter for trial or obtained a stay of proceeding for any legitimate reasons. Subsequently, the plaintiff was wound up on 3 December 2009. The plaintiff only obtained sanction on 16 January 2012. There were also other related suits going on which have nexus to the parties to this action and not to the action itself. This distinction must be kept in mind when dealing with the issue of delay.

[6] Learned counsel for the plaintiff relies heavily on the decision of *TM Feroze Khan & Ors v. Meera Hussain TM Mohamed Mydin* [1999] 4 CLJ 373 and summarises the principles as follows:

> (1) the default has been intentional and contumelious; or
>
> (2) there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and such delay will give rise to a substantial risk to a fair trial of the issues in the action or is likely to cause serious prejudice to the defendants.

And, *inter alia*, submits as follows:

> (4) The Defendant has alleged in the Striking Out application that since the dismissal of the Plaintiffs' application for an interlocutory injunction on 13.11.2008, there was inaction on the part of the Plaintiffs to set the matter down for trial.
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> (5) Therefore, the Plaintiffs humbly submit that the Striking Out application falls within the 2nd limb of the test laid down in TM Feroze's case.

(6) At this juncture, the Plaintiffs refer to the chronology of events which is attached herewith as Annexure A to this submission. My Lord will observe from perusing the chronology of events, that since November 2008 parties have been continuously involved in various related suits and winding-up petitions against the 2 Plaintiffs which resulted in various appeals at both the Court of Appeal and the Federal Court.

(7) In the TM Feroze case, the Federal Court in dealing with similar facts held as follows:

> … Whether a delay of over three months is inordinate and inexcusable depends on the facts and circumstances of each particular case. In the instant case, the delay, in our view, had been adequately explained and is not unreasonable. There existed (and still exists) two actions in tandem (ie, the originating summons by the 1st defendant and the writ action by the plaintiffs) each with claims that are intricately related to those in the other. That being so, the steps taken in the plaintiffs' writ action ought not be viewed in isolation but have to be considered against the backdrop of the events taking place in the 1st defendant's originating summons. At the time the pleadings in the writ action were deemed to be closed, the plaintiffs had already filed the application seeking to intervene in the 1st defendant's originating summons, and the application was yet to be heard. Considering that one of the reliefs sought in the plaintiffs' writ action was for a declaration that the trust deed dated 2 February 1968 and the memorandum of transfer (transferring the property to the 1st defendant himself as trustee) were void, we do not think it unreasonable that the plaintiffs chose to wait for the outcome of their application before proceeding further with their writ action. To an extent, the fact that the judge subsequently, in granting the plaintiffs leave to intervene in the originating summons, had also directed the plaintiffs to apply for consolidation of the two actions lends support to the reasonableness of the stand of the plaintiffs to await the outcome of their application to intervene and to set aside the vesting order. Admittedly, this application of the plaintiffs, though filed on 13 March 1993, was, for reasons unknown to us, not finally disposed of by the court till 30 September 1995. This, however, is essentially a matter in the hands of the court or the

A registry. There is no reason (and, indeed, none has been advanced) why the plaintiffs should be blamed for it. We are therefore of the view that the alleged delay from 22 June 1995 to 30 September 1995 cannot be said to be inordinate and inexcusable. 30 September 1995 - 30 March 1996 …

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[7] I have read the application, affidavits and submission of the parties in detail. I am grateful to learned counsel for the comprehensive submission on the facts and law. I do not wish to repeat the same save to deal with the core issues. After having C given much consideration to the submission of the learned counsel for the plaintiff, I take the view that the defendant's application must be allowed. My reasons, *inter alia*, are as follows:

(a) In the instant case, the writ was filed in 2007 and D interlocutory application was dismissed in 2008. Once the application was dismissed it would have been most appropriate for the plaintiff to proceed with case management and set the matter down for trial. Such a step will be within the spirit and intent of O. 34, which requires an action to be justly, E expeditiously and economically disposed of. In the event for any reason whatsoever the plaintiff is not able to proceed with the matter, the plaintiff ought to have filed an application for stay of proceedings and it is at the discretion of the court to make appropriate orders as it deems fit. In the instant case, F both steps were not taken by the plaintiff and no reason was given for not doing so. (A copy of my judgment in *Genisys Integrated Engineers Pte Ltd v. Pati Sdn Bhd* [2012] 1 LNS 232, was given to both parties).

G (b) In a recent case of *Genisys Integrated Engineers Pte Ltd v. Pati Sdn Bhd* [2012] 1 LNS 232 (yet unreported), I have considered the issue of delay and abuse of process of court in relation to want of prosecution, O. 34 of the Rules of the High Court 1980 and inherent jurisdiction of court to strike H out the matter. I have, *inter alia*, made the following observation:

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[10] …

(a) It is trite that: (i) the underlying principle in striking out for want of prosecution is that a plaintiff who has commenced an action against a defendant must comply with the prescribed rules of practice to prosecute his action expeditiously; (ii) a judge has a discretionary power to strike out an action for want of prosecution if either the default has been intentional and contumelious, or the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting his claim and such delay gives rise to a substantial risk that it is not possible to have a fair trial, or is likely to cause or to have caused serious prejudice to the defendant irrespective of whether the prejudice affects the actual conduct of the trial; (iii) and there is no rule of law to deprive the courts of the power to exercise their discretion to strike out an action for want of prosecution, no matter what the conduct of the defendant may have been, though the conduct is a relevant factor to be taken into account by a judge in exercising his discretion (see *Vasudevan v. T. Damudaran & Anor* (*supra*); *Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia (sued as a firm) & Ors* (*supra*)).

(b) It is also trite that the court has inherent jurisdiction to strike out any cause or matter for any justifiable reasons within the norms of procedural jurisprudence and practice. More so now under Order 34 of the Rules of the High Court 1980 which requires the court to deal with such issues at case management stage itself to ensure just, economical and expeditious disposal of the case (see *Charles Forte Investment Ltd v. Amanda* [1963] 1 Ch. D 240; *Chip Chong Sawmill Co Sdn Bhd & Ors v. Chai Khium Fui* [1978] 2 MLJ 24). I must say here that any form of delay may amount to abuse in the present system of 'tracking' and case management and the general undertaking given by the Chief Justice to the public that any suit in the court filed will be disposed of within 9 to 12 months.

(c) There has been much development in this area of jurisprudence in England, after Lord Woolf's report 'Access to Justice' in respect of civil justice system in England and Wales. Lord Woolf , *inter alia*, was very critical of any form of delay which hinders just, economical and expeditious disposal of the case. In *Grovit and others v. Doctor and others* [1997] 2 All ER

417, the House of Lords had an opportunity to consider the jurisprudence relating to 'want of prosecution', and the often quoted case of *Birket v. James* [1977] 2 All ER 801, where Lord Diplock set out the test in the following manner:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

The House of Lords in *Grovit* case also considered the criticism in relation to the 2nd limb, ie, that the delay has to cause 'serious prejudice' and also the emergence of the procedural change after Lord Woolf's report, and held that:

> The court had power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to establish want of prosecution by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant. It followed, on the facts, that the deputy judge had been fully entitled to strike out the action. The appeal would therefore be dismissed.

(d) The test applied to strike out for want of prosecution under the court's inherent jurisdiction as advocated by the House of Lord in *Grovit* case has now been widely applied in England as reported in a number of decisions and it is not just limited to the principles as set out in *Birket* case. The courts always have the inherent jurisdiction to strike out an action for abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied.

(e) In the Malaysian context, all solicitors are aware of the tracking system and the obligation for court as well as parties to justly, expeditiously and economically dispose of the case. With O. 34 in place, any form of delay in the present tracking system and the general undertaking given by the Chief Justice to the public that any suit in court filed will be disposed of within nine to twelve months, must be seen to be an abuse of process of court.

(f) In the instant case, I agree with the submission of the defendant which, *inter alia*, reads as follows:

> 28. We therefore submit that the delay is inordinate and inexcusable and, as explained hereinbefore, that the Defendant has been prejudiced by the delay because of their restructuring in October 2011. Furthermore, the Plaintiff raises allegations of fraud relating to events occurring 6 or more years ago.
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> 29. By reason of our submission that the Plaintiff filed this Action only to facilitate Enclosure 4 and that they lack seriousness and *bona fides*, we submit that the Plaintiff's delay was also intentional and contumelious.

(g) In addition, it is also my finding that the plaintiff has not demonstrated in their affidavits that they have made all reasonable attempts to prosecute this action. The delay also demonstrates that the plaintiff has no intention of bringing the action to a conclusion. In such circumstances, as I have advocated in *Genysis* (*supra*), the delay amounts to an abuse of process and the action ought to be dismissed in exercise of court's inherent jurisdiction. It is now for the apex court to set clear guidelines in this area of jurisprudence taking into consideration O. 34, fast track system and the undertaking of the Chief Justice to the public, at an opportune moment.

[8] For reasons stated above, I allow the defendant's application prayer 1. On the issue of costs, I take the view that it is a fit and proper case not to make any order as to costs.

[9] I hereby order so.